IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ROBERT ALLEN HOKE, Plaintiff/Appellant, v. KAROLYN J. McCONNELL; JACK HEET; CO II MOORE; SGT. McCLINCY; LT. RANDOLPH; CARSON McWILLIAMS; CO IV GAINES; CO III FRIDENMAKER; DORA SCHRIRO; GENE GREELEY; DEPUTY WARDEN TOERS-BIJNS; CO IV ZABORSKY; CO III GORHAM; CO II SCOGGINS; AND CO II SCARBOURGH, Defendants/Appellees.	2 CA-CV 2007-0038 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV200600730

Honorable Kevin D. White, Judge

AFFIRMED

Robert Allen Hoke
Florence
In Propria Persona

Terry Goddard, Arizona Attorney General
By Wanda E. Hofmann
Tucson
Attorneys for Defendants/Appellees

B R A M M E R, Judge.

¶1 Appellant Robert Hoke appeals from the trial court's judgment dismissing his complaint pursuant to Rule 12(b)(6), Ariz. R. Civ. P., for failure to state a claim. The court ruled that Hoke could not sue employees of the Arizona Department of Corrections (ADOC) in their individual capacities, he had failed to "allege facts to support a finding of serious physical injury," and his claim was barred by issue preclusion. Hoke contends the court was required to hold a hearing "to determine the extent of any alleged criminal conduct," improperly declined to appoint counsel to assist him, and failed to disqualify the Arizona attorney general from representing the defendants named in Hoke's complaint. Finding no error, we affirm.

Factual and Procedural Background

¶2 "In reviewing the trial court's decision to dismiss for failure to state a claim, we assume as true the facts alleged in the complaint." *Doe ex rel. Doe v. State*, 200 Ariz. 174, ¶ 2, 24 P.3d 1269, 1270 (2001). Hoke, a prison inmate in ADOC's custody, filed an action in May 2006 against fifteen ADOC employees. He claimed he is a vulnerable adult as defined by A.R.S. § 46-451(A)(10) because he has "Limb-Girdle Muscular Dystrophy" and is essentially confined to a wheelchair.[1] Hoke alleged the prison employees had violated

[1]A "[v]ulnerable adult" is "an individual who is eighteen years of age or older who is unable to protect himself from abuse, neglect or exploitation by others because of a physical or mental impairment." A.R.S. § 46-451(A)(10).

A.R.S. § 46-455, which provides: "A person who has been employed to provide care, who is a de facto guardian or de facto conservator or who has been appointed by a court to provide care to an incapacitated or vulnerable adult and who causes or permits the life of the adult to be endangered or that person's health to be injured or endangered by neglect is guilty of a class 5 felony." § 46-455(A). Section 46-455(B) creates a private right of action for any vulnerable adult "whose life or health is being or has been endangered or injured by neglect, abuse or exploitation" by "any person or enterprise that has been employed to provide care" to the vulnerable adult.

¶3 Hoke alleged the ADOC employees violated § 46-455 by placing him in the general prison population instead of in "protective segregation," thus endangering his life because he is a sex offender and other inmates "will always assault and kill [sex offenders] every chance they get"; by "unreasonably confin[ing]"[2] him in a "supermax" unit of the prison although he "is a medium custody inmate"; by providing insufficient heating in his cell; by denying him pain medication and medical services; and by failing to provide a paid inmate to push his wheelchair. He also claimed several of the above alleged incidents violated his rights under the Eighth Amendment to the United States Constitution. He requested, inter alia, $1.5 million in "consequential and actual damages," release from prison,

[2]"Abuse" under § 46-455 includes "[u]nreasonable confinement." A.R.S. § 46-451(A)(1)(c).

suspension of the requirement that he register as sex offender upon release, and "a new identity."

¶4 Hoke subsequently filed a "motion to enjoin defend[a]nts from being represented by [the] Arizona Attorney General's office," asserting that office had a conflict of interest preventing it from representing the ADOC employees. He also filed a motion to have counsel appointed for him or, in the alternative, to be provided with a computer with access to a legal research database. The trial court denied both motions without comment.

¶5 The employees filed a motion to dismiss pursuant to Rule 12(b)(6), Ariz. R. Civ. P., contending that Hoke was collaterally estopped from asserting a claim under § 46-455 because "[t]he Arizona Court of Appeals has already ruled that Hoke may not prosecute a case against prison personnel under A.R.S. § 46-455"[3]; that Hoke "may only name the State as a defendant" instead of individual ADOC employees pursuant to A.R.S. § 31-201.10(F); and that he had "failed to allege facts necessary to demonstrate serious physical injury [as required by] A.R.S §§ 31-201(L) and (N)(2)." The trial court granted the motion on all three grounds. This appeal followed.

[3]Hoke filed a similar claim in 2005 that the trial court dismissed for failure to comply with § 12-821.01, which requires the prior submission and denial of a written claim before a claimant may sue a public entity or employee. We upheld that dismissal on appeal. *Hoke v. State*, 2 CA-CV 2005-0196 (memorandum decision filed June 21, 2006).

Discussion

¶6 In reviewing the dismissal of a complaint for failure to state a claim, we assume the truth of the facts alleged in the complaint and will affirm "only if, as a matter of law, the plaintiff would not be entitled to relief on any interpretation of those facts." *Doe ex rel. Doe v. State*, 200 Ariz. 174, ¶ 2, 24 P.3d 1269, 1270 (2001). We review a trial court's grant of a motion to dismiss for an abuse of discretion but review issues of law de novo. *Dressler v. Morrison*, 212 Ariz. 279, ¶ 11, 130 P.3d 978, 980 (2006). Hoke first asserts the court erred by determining A.R.S. § 31-201.01(F) precluded his claim against the individual employees. That subsection provides: "Any and all causes of action which may arise out of tort caused by the director, prison officers or employees of the department, within the scope of their legal duty, shall run only against the state." § 31-201.01(F); *see also Tripati v. State*, 199 Ariz. 222, ¶ 5, 16 P.3d 783, 785 (App. 2000).

¶7 Hoke claims the employees had "step[ped] outside their legal duty" by violating A.R.S. § 46-455 and committing tortious and criminal acts, but he does not explain what tortious acts the employees actually committed that were outside the scope of their legal duties. Instead, he appears to argue that any tortious or criminal act is necessarily outside an employee's legal duty. But, if this were so, § 31-201.01(F) would have no effect, and we will not interpret a statute in a way that renders it meaningless or ineffective. *See Vega v. Morris*, 183 Ariz. 526, 530, 905 P.2d 535, 539 (App. 1995) (appellate court presumes "that the

legislature does not include in statutes provisions which are redundant, void, inert, trivial, superfluous, or contradictory").

¶8 Moreover, nothing in Hoke's complaint suggests the employees took any action that was extraneous to their legal duty to "hold in custody all persons sentenced to [ADOC]." § 31-201.01(A). That duty necessarily requires ADOC employees to be involved in the transport, management, and medical care of inmates and operation of the facilities that house those inmates. Even if accomplished tortiously or in violation of criminal law, acts in furtherance of those duties clearly fall within § 31-201.01(F) because such acts would arise from ADOC's general duty to hold all inmates in custody. *See also* Restatement (Second) of Agency § 231 (1958) ("An act may be within the scope of employment although consciously criminal or tortious.").

¶9 Hoke also contends § 31-201.01(F) violates the equal protection clause of the Fourteenth Amendment to the United States Constitution and article II, § 13 of the Arizona Constitution. He argues that, because § 31-201.01(F) prevents a "convicted person" from pursuing a claim against individual ADOC employees while "a non-convicted person would be able to file and prosecute" such an action, he is being denied equal protection of the law. (Emphasis removed.) But Hoke misapprehends § 31-201.01(F)—it does not apply only to those actions brought by felons but, instead, applies to "[a]ny and all causes of action which may arise out of tort." And, in any event, because Hoke did not raise this argument in the trial court, he has waived it on appeal. *Englert v. Carondolet Health Network*, 199 Ariz. 21,

¶ 13, 13 P.3d 763, 768 (App. 2000) ("[W]e generally do not consider issues, even constitutional issues, raised for the first time on appeal.").

¶10 Accordingly, the trial court did not err in determining Hoke had failed to state a claim upon which relief could be granted because he had not named the state as a party defendant.[4] Because of this conclusion, we need not reach Hoke's additional arguments concerning the employees' motion to dismiss.

¶11 Hoke next argues that § 46-455(F) "imposes a mandatory duty upon the superior court . . . to hold a hearing to determine the extent of any alleged criminal conduct."[5] His argument has no textual support in the statute, which provides: "The superior court has jurisdiction to prevent, restrain and remedy the conduct described in this section, after making provision for the rights of all innocent persons affected by such conduct and after a hearing or trial, as appropriate, by issuing appropriate orders." § 46-455(F). Nothing in § 46-455(F) dispenses with the requirement that a plaintiff state a claim upon which relief can be granted, nor is the hearing the statute contemplates one a trial court is obligated to hold.

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[4]The trial court determined that, "[t]o the extent that [Hoke's] complaint [could] be interpreted as an action against the State," he had not stated a claim because he failed to "allege facts to support a finding of serious physical injury." *See* § 31-201.01(L). Because Hoke does not argue on appeal that we should read his complaint as one against the state rather than against the individual employees, we do not address this part of the trial court's ruling.

[5]Hoke devotes much of this portion of his brief to asserting the trial court was biased against him, had a conflict of interest, and did not act with sufficient "urgency." We find no support in the record for these accusations.

¶12 Hoke next asserts the trial court erred by denying his request for an attorney to represent him. Rather than urge any grounds for error on appeal, Hoke instead "incorporate[s]" the motion he made in the trial court. That motion argued that § 46-455(F) gives a trial court the authority to appoint counsel. He did not claim, however, nor could he colorably argue, that the statute requires a court to do so. In a civil action, Hoke has no due process right to appointed counsel. *See Lassiter v. Dep't of Social Servs. of Durham County, N.C.,* 452 U.S. 18, 25, 101 S. Ct. 2153, 2158 (1981) ("The pre-eminent generalization that emerges from this Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation.").

¶13 Hoke essentially argues the trial court should have appointed counsel for him because the law library and legal assistance ADOC provides are inadequate. As authority, Hoke relies on *Bounds v. Smith*, 430 U.S. 817, 97 S. Ct. 1491 (1977), in which the Supreme Court held "that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries *or* adequate assistance from persons trained in the law." 430 U.S. at 828, 97 S. Ct. at 1498 (emphasis added). Even were we to assume, however, that a violation of *Bounds* requires a trial court to appoint counsel for an incarcerated litigant, there is no violation here. Hoke admits he has access to a law library. Although he complains that it provides only "a few misc[ellaneous] legal text[s] and resource

material[s]," he does not explain how it is constitutionally inadequate. As the Supreme Court stated in *Lewis v. Casey*, 518 U.S. 343, 355, 116 S. Ct. 2174, 2182 (1996):

> *Bounds* does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims. The tools it requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any *other* litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration.

¶14 Finally, Hoke asserts the trial court erred by denying his motion to disqualify the Arizona attorney general's office from representing the ADOC employees. He contends the attorney general has a conflict of interest because "the defendants are being accused of committing felony offenses" and the attorney general "has a higher duty to the general public to make sure that public employees do not commit any criminal offenses." The employees counter that Hoke is precluded from raising this issue on appeal and must raise it by special action. They cite *Speer v. Donfeld*, 193 Ariz. 28, ¶ 1, 969 P.2d 193, 195 (App. 1998), and *State ex rel. Romley v. Superior Court*, 181 Ariz. 378, 380, 891 P.2d 246, 248 (App. 1995), both of which hold the granting of a motion to disqualify counsel is not an appealable order. But neither case addresses whether the denial of such a motion may properly be challenged on appeal.

¶15 We need not reach that issue, however, because Hoke's claim of error is utterly without merit. We review a trial court's ruling on a disqualification motion for an abuse of

discretion. *Smart Indus. Corp. v. Superior Court*, 179 Ariz. 141, 145, 876 P.2d 1176, 1180 (App. 1994). "Only in extreme circumstances should a party to a lawsuit be allowed to interfere with the attorney-client relationship of his opponent." *Alexander v. Superior Court*, 141 Ariz. 157, 161, 685 P.2d 1309, 1313 (1984).

¶16 Central to Hoke's claim that the attorney general has a conflict of interest in this case is his assertion that "the defendants are being accused of committing felony offenses." The employees have not, however, been charged with a crime by any law enforcement agency. Instead, they have been named as defendants in a civil action. Arizona's attorney general may "represent an officer or employee of this state against whom a civil action is brought in his individual capacity until such time as it is established as a matter of law that the alleged activity or events which form the basis of the complaint were not performed . . . within the scope of the [individual's] duty or employment." A.R.S. § 41-192.02. The attorney general has no cognizable conflict of interest.

¶17 We affirm the trial court's judgment in favor of the employees.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PHILIP G. ESPINOSA, Judge

PETER J. ECKERSTROM, Presiding Judge